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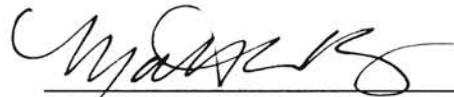
71535-6

NO. 71535-6-I
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHNNY FERARA,
PLAINTIFFS, APPELLANTS,
V.
MICAELA AND JOHN DOE RICH,
DEFENDANTS, CROSS-APPELLANTS

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
KING COUNTY CAUSE NO. 13-2-20919-5 SEA

APPELLANTS' OPENING BRIEFING



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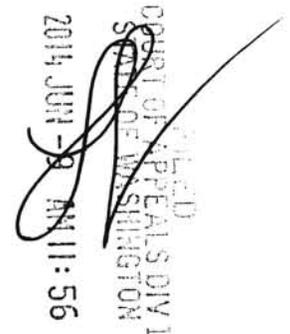


TABLE OF CONTENTS

	PAGE
I. Introduction	5
II. Assignments of Error	5
Issues Pertaining to Assignments of Error	5
III. Statement of the Case	5
IV. Summary of Argument	6
V. Argument	6
A. Negligence is an Issue for the Trier of Fact	9
B. Inferences	9
C. Duties of Care	10
D. Genuine Issues of Material Fact Existed	14
VI. Conclusion	14

TABLE OF AUTHORITIES

Washington State Cases

<i>Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	9
<i>Balise v. Underwood</i> , 62 Wn. 2d 195, 381 P.2d 966 (1963).....	12, 13
<i>Baughn v. Honda Motor Co.</i> , 107 Wn.2d 127, 727 P.2d 655 (1986).....	8
<i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 850 P.2d 1298 (1993).....	7
<i>Dickinson v. Edwards</i> , 105 Wn.2d 457, 716 P.2d 814 (1986).....	10
<i>Fann v. Cowlitz County</i> , 93 Wn.2d 368 (1980).....	9
<i>Gordon v. Deer Park Sch. Dist.</i> , 71 Wn.2d 120, 426 P.2d 824 (1967).....	11
<i>Hudesman v. Foley</i> , 73 Wn.2d 880, 441 P.2d 532 (1968).....	11, 12
<i>Kahn v. Salerno</i> , 90 Wn.App. 110, 951 P.2d 321 (1998).....	6
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975).....	8
<i>Logue v. Swanson 's Food</i> , 8 Wn.App. 460.....	11
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 519 P.2d 7 (1974).....	7
<i>No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.</i> , 71 Wn.App. 844, 863 P.2d 79 (1993).....	11
<i>Owen v. Burlington N. & Santa Fe R.R.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005).....	7, 8
<i>Preston v. Duncan</i> , 55 Wn.2d 678, 349 P.2d 605 (1960).....	10
<i>Renz v. Spokane Eye Clinic, P.S.</i> , 114 Wn.App. 611, 60 P.3d 106 (2002).....	11
<i>Reynolds v. Kuhl</i> , 58 Wn.2d 313, 362 P.2d 589 (1961), summary judgment was.....	13
<i>Ruff v. King County</i> , 125 Wn.2d 697, 887 P.2d 886 (1995).....	8
<i>Schmitt v. Langenour</i> , 162 Wn.App. 371, 256 P.3d 1235 (2011).....	7

<i>Scott v. Pac. Power & Light Co.</i> , 178 Wn.2d 647, 35 P.2d 743 (1943).....	11
<i>Stenger v. State</i> , 104 Wn.App. 393, 16 P.3d 655 (2001).....	7
<i>Thomas v. C. J. Montag & Sons, Inc.</i> , 54 Wn.2d 20, 337 P.2d 1052 (1959).....	8
<i>U.S. Bank v. Whitney</i> , 119 Wn.App. 339, 81 P.3d 135 (2003).....	8
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	9
<i>Washington Public Utility System v. Public Utility Dist. No. 1 of Clallam County</i> , 112 Wn.2d 1, 771 P.2d 701 (1989).....	7
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	9
<i>Wojcik v. Chrysler Corp.</i> , 50 Wn. App. 849, 751 P.2d 854 (1988).....	10
<i>Wood v. Seattle</i> , 57 Wn.2d 469, 358 P.2d 140 (1960).....	11
<i>Woodall v. Freeman Sch. Dist.</i> , 136 Wn.App. 622, 146 P.3d 1242 (2006).....	8, 9
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	7, 10

Court Rules

CR 56.....	6, 7, 9
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Persuasive Authorities

10 Wright & Miller, Federal Practice & Procedure, §2729, p. 195 (1983)	10
<i>Arney v. United States</i> , 479 F.2 653 (9th Cir. 1973)	11
6 Moore 's Federal Practice Manual §561.17[42].....	10

I. Introduction

This case arises from a motor vehicle accident between Tyler Ferara and Micaela Rich. Johnny Ferara, appellant, was a fault-free passenger in Tyler Ferara's vehicle. Mr. Ferara filed suit against Michaela Rich, arguing Rich was negligent in the manner in which she drove her vehicle. The Court entered summary judgment in Rich's favor and from which this appeal was timely taken.

II. Assignments of Error

The trial court erred in granting the defendants' summary judgment motion finding no genuine issues of material fact existed where eyewitness testimony and the facts of the collision show the Defendant had an opportunity to avoid the accident and was negligent.

Issues Pertaining to Assignments of Error

Whether a genuine issue of material fact exists when eyewitness testimony establishes that the Defendant's vehicle impacted the rear portion of the Plaintiff's vehicle and admissible opinion testimony was offered regarding the Defendant's vehicle speed.

III. Statement of the Case

On May 25, 2010, Johnny Ferara was riding as a passenger with his nephew Tyler Ferara, who was driving the 1998 Audi. CP 1-3; CP 41. The Feraras were making a lefthand turn onto 137th Avenue Northeast, in

Kirkland, Washington. CP 40-41. Suddenly, and without warning, Mr. Ferara's car was struck by Plaintiff. CP 40-41. The resulting impact caused the vehicle to careen across the intersection, rotate over 180 degrees, and come to a rest along the curb. CP 40-41.

Ms. Rich was traveling at a speed greater than prudent when the collision occurred. CP 40-41. Further, Ferara saw that there was ample opportunity for Ms. Rich to stop once she realized Tyler Ferara was turning in front of her, but failed to do so. CP 40-41. Further, Ms. Rich's car struck the rear section of Ferara's vehicle – showing that the Ferara vehicle has almost completed the left turn prior to the collision. CP 40-41.

IV. Summary of Argument

The trial court erred when it granted summary judgment; negligence was at issue through Mr. Ferara's declaration.

V. Argument

An appellate court reviews an order granting summary judgment de novo and engages in the same inquiry as the trial court. *Kahn v. Salerno*, 90 Wn.App. 110, 117, 951 P.2d 321 (1998). Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c);

Schmitt v. Langenour, 162 Wn.App. 371, 404, 256 P.3d 1235 (2011). “A ‘material fact’ is one on which the outcome of the litigation depends, in whole or in part.” *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

A defendant moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Under CR 56(e), affidavits and declarations must set forth facts admissible in evidence that are made on personal knowledge. *Stenger v. State*, 104 Wn.App. 393, 409, 16 P.3d 655 (2001). Thus, the affidavits that do not state specific facts, make conclusory statements, or are based on hearsay or speculation cannot support a summary judgment; and such statements in summary judgment affidavits must be discarded as surplusage. *Id.*; *Washington Public Utility System v. Public Utility Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 18, 771 P.2d 701 (1989).

On summary judgment, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). Questions of fact may only be determined as a matter of law when reasonable minds could reach but one conclusion. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005). If

reasonable minds can differ, the question of fact is reserved for the trier of fact and summary judgment is not appropriate. *Id.* An appellate court reviews an order granting summary judgment de novo. *U.S. Bank v. Whitney*, 119 Wn.App. 339, 347, 81 P.3d 135 (2003).

When deciding summary judgment, “the court must not resolve an existing factual issue.” *Woodall v. Freeman Sch. Dist.*, 136 Wn.App. 622, 628, 146 P.3d 1242 (2006) (citing *Thomas v. C. J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959)). “The issues of negligence and proximate cause are generally not susceptible to summary judgment.” *Ruff v. King County*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (citing *LaPlante v. State*, 85 Wn.2d 154, 159, 531 P.2d 299 (1975)); *Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 142, 727 P.2d 655 (1986) (proximate cause generally left to jury).

On review of an order regarding summary judgment, the appellate court must engage in the same inquiry as the trial court. *Braegelmann v. Snohomish County*, 53 Wn.App. 381, 383, 766 P.2d 1137 (1989).

Summary judgment is proper where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Braegelmann*, 52 Wn.App. at 383, 766 P.2d 1137. Summary judgment should be granted if reasonable persons could reach but one conclusion. *Braegelmann*, 53 Wn.App. at 384, 766 P.2d 1137.

A. Negligence is an Issue for the Trier of Fact

It is well established in Washington that “[i]ssues of negligence are ordinarily not susceptible of summary adjudication.” *Rathvon v. Columbia Pacific Airlines*, 30 Wn.App. 193, 633 P.2d 122 (1981), *rev. den.* 96 Wn.2d 1025 (1982). The standard of review is *de novo* and summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c) In reviewing a summary judgment motion, the court views all facts in the light most favorable to the non-moving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (*citing Atherton Condo. Apartment Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A motion for summary judgment may not be used to displace a trial on the facts where there is a genuine issue of fact. *Fann v. Cowlitz County*, 93 Wn.2d 368 (1980).

B. Inferences

The court “considers all facts and reasonable inferences in the light most favorable to the nonmoving party.” *Woodall*, 136 Wn. App. at 628.

“An inference is a ‘process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.’ ” *Wojcik v. Chrysler Corp.*, 50 Wn. App. 849, 853-54, 751 P.2d 854 (1988) (quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986)). As a result, even when facts are undisputed, proximate cause presents a jury question, especially as to such matters as “knowledge,” “good faith,” and “negligence,” where, although evidentiary facts are not in dispute, different inferences may be drawn therefrom as to intent, knowledge, good faith, or negligence, a summary judgment will not be proper. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

C. Duties of Care

Summary Judgment is “rarely appropriate when the issue involves negligence or contributory negligence, 10 *Wright & Miller, Federal Practice & Procedure*, §2729, p. 195 (1983), since “even where there is no dispute as to the facts, it is usually for the jury to decide whether the conduct in question meets the reasonable man standard. *Id. at p. 217*. In other words, issues that require the determination of the reasonableness of the acts of the parties under all the facts and circumstances of the case, cannot ordinarily be disposed of by summary judgment. 6 *Moore ‘s*

Federal Practice Manual §561.17[42] at 56-532; *Arney v. United States*, 479 F.2 653 at 600 (9th Cir. 1973).

Whether one's conduct meets the test of a reasonably prudent person is normally a question of fact for determination by the jury. *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960). Only in rare cases, where reasonable minds cannot differ, is the trial court warranted in deciding the issue as a matter of law. *Raybell v. State*, 6 Wn.App. 795, 496 P.2d 5999 (1972). *Logue v. Swanson 's Food*, 8 Wn.App. 460 at 461-62. 507 P.2d 1202 (1973). *See also Gordon v. Deer Park Sch. Dist.*, 71 Wn.2d 120, 426 P.2d 824 (1967). *Scott v. Pac. Power & Light Co.*, 178 Wn.2d 647, 35 P.2d 743 (1943) (whether one who is charged with negligence has exercised reasonable care is a question of fact for the jury).

“[I]t is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility.” *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 623, 60 P.3d 106 (2002), quoting *No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn.App. 844, 854 n. 11, 863 P.2d 79 (1993). Cases involving conflicting testimony on liability are never susceptible to summary judgment. *Hudesman v. Foley*, 73 Wn.2d 880, 441 P.2d 532 (1968). As the Washington Supreme Court has repeatedly held:

When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. *Id.* at 887; *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

Applying this concept, the court in *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963), found summary judgment inappropriate because issues of credibility existed. *See id.* at 200. In that case, the issue was whether the defendant driver was, at the time of the car accident, acting within the scope of his employment. *Id.* at 198. The plaintiff presented evidence that the defendant driver was traveling from a job site to his home, that the defendant driver was transporting tools owned by his employer, that his supervisor came to the scene of the accident to secure the release of the tools, and that the defendant driver had made a claim for worker's compensation for his injuries from the accident. *Id.* The defendant driver later withdrew his claim for worker's compensation, but he testified that he had done so for fear of losing his job. *Id.*

Nonetheless, the court determined the case was not susceptible to summary judgment. *Id.* at 200. The defendant driver's employer testified that the defendant driver was not acting within the scope of his employment, and was simply on his way home from work after finishing

his day's labor. *Id.* at 198. This testimony raised an issue of credibility of the defendant driver versus his employer, which was an issue that the jury alone must resolve. *Id.* at 200.

In a similar case, *Reynolds v. Kuhl*, 58 Wn.2d 313, 362 P.2d 589 (1961), summary judgment was reversed because an issue of fact existed regarding whether the plaintiff had the “last clear chance” to avoid the accident. In that case, the plaintiff was proceeding through an intersection with the right of way when the defendant pulled out in front of her. *Id.* at 314. The plaintiff testified that she saw the defendant's car when she was approximately 200 feet from the intersection, and then “didn't bother to look at her any more.” *Id.* at 316. The defendant admitted that she was negligent but alleged that the plaintiff was contributorily negligent. *Id.* The plaintiff moved for summary judgment on liability and won.

Reversing the trial court, the Court of Appeals held:

All drivers, including those having the right of way, must exercise ordinary care. Excessive speed, failure to keep a lookout, or failure to stop or to reduce his speed when danger should have been recognized may constitute negligence of the favored driver. *Id.* at 315.

The plaintiff's admission that she “didn't bother to look” at the defendant again after she first saw it 200 feet from the intersection raised an issue of fact as to the plaintiff's negligence. Summary judgment thus could not be granted.

D. Genuine Issues of Material Fact Existed

The Plaintiff established genuine issues of material fact. The Ferara declaration, along establishes (1) Ms. Rich was travelling faster than the posted speed, (2) the collision occurred behind the passenger side door, (3) Ms. Rich could have slowed and avoided the accident, and (4) the Ferara vehicle had mostly made it through the turn, thus giving Rich ample notice of the driver's actions.

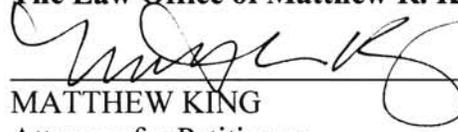
Even if Rich was the favored driver, her complete lack of attention to oncoming traffic raises an issue of fact regarding her negligence. Regardless that Ms. Rich denies her negligence in her declaration (CP 23-27), Mr. Ferara's declaration, alone, creates a genuine issue of material fact. Ms. Rich's negligence can only be decided by the jury, so summary judgment should have been denied.

VI. Conclusion

The trial court erred in granting summary judgment to the Defendants in this case. Mr. Ferara's declaration conflicts with Ms. Rich's declaration. Mr. Ferara's declaration raises material facts as to Ms. Rich's negligence. Summary judgment should not have been granted; Mr. Ferara should be allowed to proceed to trial.

RESPECTFULLY SUBMITTED this 6th day of June, 2014.

The Law Office of Matthew R. King, PLLC

A handwritten signature in black ink, appearing to read "Matthew R. King", is written over a horizontal line.

MATTHEW KING

Attorney for Petitioner

Washington State Bar Association No. 31822

Declaration of Mailing

I, Matthew King, hereby declare:

1. On June 6, 2014, I caused two copies of Petitioner's Brief to be mailed, via US Mail, return receipt requested to:

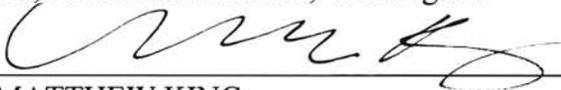
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2. On June 6, 2014, I caused one copy of the Petitioner's Brief to be mailed, via US Mail, return receipt requested to:

The Law Offices of Shahin Karim
520 Pike Street, Suite 1300
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 6th day of June, 2014 at Sammamish, Washington.



MATTHEW KING
Attorney for Petitioner
Washington State Bar Association No. 31822